

correlation between forfeitures and the related sanction of a short-term renewal.^{418/}

It is urgent that some forfeiture guidelines be adopted soon. The guidelines set out in the NPRM would be a modest improvement over the current case-by-case regime.^{419/} Unfortunately, the level of EEO forfeitures proposed in the NPRM is so low that by amortizing a forfeiture over a license term, a broadcaster could pay a forfeiture out of its petty cash account. A \$25,000 forfeiture, amortized over eight years, is \$8.56 per day.

^{418/} The study concluded that "[b]ecause the FCC's range of forfeitures is modest, bell shaped and almost entirely bereft of skew either upward or downward from the mean, and the FCC's application of upward and downward adjustments appears to be evenhanded and well within its administrative discretion, the study concluded that public debate on the question of forfeiture amounts should focus largely on the appropriateness of the normative forfeiture amount relative to the normative forfeitures for non-EEO violations, rather than on the FCC's discretionary and apparently unassailably even-handed administration of its forfeiture policies." See p. 55 supra.

^{419/} The Commission has been handing out very large forfeiture reductions which -- irrespective of their individual merits -- are collectively doing much to reduce compliance incentives at a time when such incentives are needed the most. See, e.g., First Greenville Corp., 11 FCC Rcd 7399 (1996) (reducing forfeiture from \$37,500 to \$6,000); Historic Hudson Valley Radio, Inc., 11 FCC Rcd 7391 (1996) (reducing forfeiture from \$25,000 to \$8,000); Buckley Broadcasting Corporation, 11 FCC Rcd 6628 (1996) (reducing forfeiture from \$25,000 to \$7,000); Omaha Great Empire Broadcasting, Inc., 11 FCC Rcd 6346 (1996) (reducing forfeiture from \$25,000 to \$12,000); Walker County Communications, Inc., 11 FCC Rcd 6344 (1996) (reducing forfeiture from \$31,500 to \$15,000). Commissioner Barrett has observed that the Commission is unfortunately "bound by what I would argue is outdated EEO case precedent" resulting in much smaller forfeitures. Sun Mountain Broadcasting, Inc., 11 FCC Rcd 1706, 1707 (1996) (Separate Statement of Commissioner Andrew C. Barrett) (commenting in case in which a \$18,750 forfeiture was reduced to \$8,000).

We encourage the Commission to assign EEO violations a higher relative priority, equivalent to that afforded misrepresentations.^{420/} A base forfeiture equivalent to the base forfeiture for nondisqualifying misrepresentations would be consistent with the principle that denial of equal opportunity inherently misrepresents a licensee's status to the public, job seekers and the Commission.

^{420/} See NPRM, supra, 11 FCC Rcd at 5172 (Separate Statement of Commissioner Andrew C. Barrett) (compared to children's television forfeitures, "[t]he forfeitures for repeated EEO violations are by comparison, exceedingly low. Therefore, I am convinced that the Commission sends a clear message to the minority and female communities about the importance of its EEO rules.") As the Commission noted in another context, a slap on the wrist forfeiture, "far from having a cathartic effect on management of the station...would be cynically viewed as just another cost of doing business." See United, supra, 55 FCC2d at 841.

7. Upward adjustment factors should reflect the gravity of the violator's conduct

A forfeiture should be adjusted above the base amount when a licensee's conduct is especially egregious or when it should have known better. Aggravating factors should include:

1. Minority or female hiring rates below 60% of parity.

No station can achieve parity on its staff if it never achieves parity in its hiring rate. A guideline which recognizes this fact is appropriate. 60% of parity is a reasonable figure which, like the zone of reasonableness, should contract over time. See pp. 283-287 supra.

2. Station size. Smaller stations should receive no special consideration in any area of EEO enforcement except forfeitures. See pp. 190-194 supra. Larger stations are not only better able to pay a forfeiture, they may be presumed to be more capable of retaining experienced labor specialists and counsel whose advice puts them on notice of their continuing EEO obligations. Thus, these stations "should know better." See, e.g., Fidelity Television, Inc. (KCAL-TV), 11 FCC Rcd 6766 (1996) (imposing \$30,000 forfeiture on television station in Los Angeles with over 300 employees); GAF Broadcasting Company, Inc., 10 FCC Rcd 10760 (1995) (imposing \$30,000 forfeiture on large FM station in New York City).

3. EEO violations at commonly owned stations. Companies which violate the EEO Rule almost everywhere they operate, as a matter of corporate policy, should not be in broadcasting in the first place. If the Commission allows them to remain as licensees and instead imposes forfeitures, it should consider commonly owned stations to be systemic violators and increase any one forfeiture accordingly. See pp. 233-234 supra (discussing group owners' EEO violations).

4. Recidivism. Recidivists should go to hearing. See pp. 229-232 supra. But if they don't, the Commission should impose forfeitures tied to the gravity of any past misconduct for which they had actual notice of the Commission's disapproval (e.g., an admonishment, sanction at a commonly owned station, a television station midterm review, or EEO conditions on an earlier renewal.)

5. EEO violations beyond the hiring stage. Forfeitures should be increased when a licensee has failed to comply with the Second Generation goals of the EEO Rule, e.g., working conditions, retention, compensation and promotion. See pp. 313-320 and 337 supra. An appropriate upward adjustment would be "[f]ailure to fully and fairly utilize, promote, train, compensate, retain, protect from termination, and provide generally equal working conditions for minority and female employees." Because forfeitures for these types of violations are new, the Commission should revisit and fine-tune its guidelines in two years with the benefit of additional experience.

8. Downward adjustments in forfeitures should reflect genuine mitigating factors

If broadcasters are to maintain respect for the EEO Rule, they must never be able to "game" the system by obtaining a forfeiture reduction or downward adjustment except for a genuine mitigating factor. Some of those factors are:

1. Minority and female hiring rates exceeding 100% of parity. This factor would parallel our proposed aggravating factor of a hiring rate below 60% of parity. See p. 340 supra. It is appropriate as a mitigating factor because a company which hires at a rate exceeding parity will inevitably achieve parity on its staff.

2. Outstanding EEO efforts beyond the hiring stage. EEO violations arising at the recruitment level are mitigated if the station treats its employees fairly once it does hire them. Thus, a mitigating factor which mirrors our proposed aggravating factor of EEO violations beyond the hiring stage is appropriate. See p. 341 supra.

3. Very serious financial distress. The Commission should be very careful not to open the door too wide to claims of poverty. Claims of poverty are inconsistent with nondiscrimination enforcement. See EEOC v. McLean Trucking Co., 834 F.2d 398 (4th Cir. 1987) (holding that bankruptcy cannot be used to deprive claimants of money owed them because of a Title VII violation). Financial relief in the case of a Chapter 7 bankruptcy is tolerable, however. See, e.g., Dennis Elam, Trustee, 11 FCC Rcd 1137 (1996). However, cases like First Greenville Corp., 11 FCC

Rcd 7399 (1996), in which a forfeiture was reduced from \$37,500 to \$6,000 based, in large part, on the applicant's claimed inability to pay, are troubling. These claims are easy to make and often impregnable to challenge.^{421/} Consequently, the Commission should waive forfeitures for licensees in Chapter 7, toll the payment due dates for licensees in Chapter 11 until they emerge from Chapter 11, and negotiate installment payment schedules for nonbankrupt licensees who can demonstrate genuine financial distress.^{422/} These installment payment schedules should protect the Treasury from losing the money if the station is sold.^{423/}

^{421/} Common broadcast station accounting practices which have the effect of disguising profits include (1) arbitrarily setting aside a huge reserve for future capital expenses, (2) incurring current capital expenses before they are really necessary, (3) underreporting barter income, and (4) paying owner/managers higher than market salaries or awarding them special bonuses rather than paying dividends. There are other sleights of hand. The Commission is ill equipped to unravel this accounting artistry to determine a broadcaster's true financial condition.

^{422/} A good definition of a nonbankrupt station's financial distress would tie the extent of any claimed distress to the amount of the forfeiture itself. One definition would declare that a nonbankrupt station is financially distressed if paying the forfeiture would throw the station into Chapter 11 status.

^{423/} Payments over time should be the continuing responsibility of the licensee. If the station is sold, the full balance due should be taken off the top at the closing, following the IRS' always-successful procedure in collecting back taxes at broadcast station closings. This will prevent a licensee from selling the station, leaving the business, closing down the corporation, and leaving nobody to pay the rest of the debt.

B. As an alternative to forfeitures, and in light of the Telecommunications Act's elimination of comparative renewals, the Commission should adopt alternative sanctions and remedies

Short term renewals are commonly used in connection with forfeitures. Since at least 1990, no station which received a short term renewal did not also receive a forfeiture. See "FCC EEO Forfeitures, 1990 - 1996", Exhibit 2 hereto.

The only risk facing a broadcaster who received a short term renewal was the risk of a competing application. Since the Telecommunications Act banned competing applications, short term renewals are no longer a viable sanction because there is no risk inherent in the act of filing a postcard. See p. 69 supra.^{424/} Clearly, an alternative sanction is needed.^{425/}

^{424/} In The Advancement of Black Americans in Mass Communications, 76 FCC2d 385, 393 (1980), the Commission recognized that the "suggestion that alternative sanctions be utilized may be a useful one" and it referred the question to the Broadcast Bureau. The petitioner for rulemaking had suggested these alternative sanctions: "(a) license suspension, under which the licensee could continue operations but profits would for a specified period go to a nonprofit group; (b) partial revocation, which would require time-sharing for certain hours each day; (c) rehabilitative relief, under which, for example, a licensee not conforming with our EEO rules might be required to finance minority training programs."

^{425/} Cf. WHEC, Inc., 52 FCC2d 1079, 1089 (1975) ("WHEC"), in which a short term renewal would normally have been warranted, but imposing one would have been meaningless. The 1975-1978 license term was just ready to begin when the Commission rendered its decision on the licensee's conduct during the 1969-1972 license term. WHEC shows that the Commission has long been conscious that the enforcement value of a short term renewal stems from the risk attendant to a mid-term renewal filing.

A procedure which might replace the short term renewal is a consent decree, similar in form to those reached with cable MSOs on billing and carriage issues.^{426/} EEO consent decrees might include covenants against discrimination and retaliation, expanded recruiting, and enhanced recordkeeping and reporting. They might also require job structure analyses,^{427/} and, in extreme cases, goals and timetables.^{428/} All consent decrees should include commitments for training and internships.^{429/}

^{426/} See Adelphia, 9 FCC Rcd at 912 (Concurring Statement of Commissioner Ervan Duggan) (calling for the Commission to "use consent decree-style enforcement methodology in this vitally important area"); Midland Broadcasters, Inc., 9 FCC Rcd 2091, 2097 (1994) (Concurring Statement of Commissioner James H. Quello) (calling for the use of common carrier-style consent decrees).

^{426/} See, e.g., Independence, 53 FCC2d at 1166.

^{427/} See, e.g., Arkansas Television Co., 46 RR2d 883, 884 (1979); Sonderling Broadcasting Corp., 68 FCC2d 752, 756 (1977).

^{428/} This issue has long been on the Commission's mind. See Nondiscrimination - 1969, 18 FCC2d at 245 (suggesting that "broadcasters might consider the adoption of special training programs for qualifiable minority group members.") See discussion at pp. 212-213 supra.

IX. The Commission Can Take Modest Deregulatory Steps To Assist Broadcasters To Comply With The EEO Rule And To Stimulate And Reward Exceptional EEO Compliance Efforts

- A. The Commission should develop a model recordkeeping system for job applicants, interviewees and selectees, with provisions for electronic recordkeeping and electronic filing of Form 395, Form 396, and Bilingual data**

A record-keeping system is the heart of any EEO program. As we have noted, almost every broadcaster has the paperless office technology necessary to make EEO recordkeeping and tracking a breeze. See pp. 60-61 supra. The Commission would perform a great public service if it created a model recordkeeping, tracking and reporting system, geared for electronic filing of Form 395, Form 396, and most responses to Bilingual letters.

Smaller stations would especially benefit from a model recordkeeping system, since they are less able than other broadcasters to buy one from an EEO consultant or pay a law firm to create one.

Such a recordkeeping system should be designed around two running tables:

- (1) a running recruitment table to be used by station employees who perform recruitment and hiring functions; and
- (2) a table summarizing the status of current employees.

These tables would not need to be submitted with a renewal application. Moreover, a station could choose not to maintain such tables as part of its day-to-day recordkeeping, opting instead to reconstruct the data if it ever receives a Bilingual letter. However, the production of these tables would be deemed an appropriate response to the recruitment questions in the current version of a standard Bilingual letter.

Here is a suitable format for a running recruitment table:

Job <u>title</u>	395-B job classif- ication	Full or part- Time	Date position <u>filled</u>	Referral sources <u>contacted</u> */	Number, race and sex of referrals from each <u>source</u>	Number, referral source, race and sex of Each <u>Interviewee</u> **/
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*/ Indicate which are minority and/or female.

**/ Indicate which was the successful candidate.

Here is a table summarizing current employees' status:

<u>Job title</u>	395-B job classifi- cation; FT/PT <u>status</u>	Race and sex	Start date <u>at station</u>	Start date for this <u>position</u>	Pay <u>rank only</u>
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- B. The Commission should adopt a short-form 396 (Form 396-EZ), containing basic information needed to independently validate EEO compliance, for very small standalone stations

The Commission should authorize the experimental use of alternative EEO efforts showings for very small standalone stations. These are nondupolized, non-LMA'ed stations having fewer than 100 person-months of employees per year.

We generally endorse the NPRM's proposal that very small stations could have management personnel attend at least four job fairs each year and develop internal resume banks to use when filling vacancies. Id., 11 FCC Rcd at 5166 ¶24.429/ These stations should actively and personally recruit at the job fairs.

429/ We are persuaded that job fair participation is likely to result in greater representation of minorities in applicant pools. See p. 52 supra (discussing Tennessee study).

The job fairs should include very significant participation by minorities and women. Stations should be expected to keep their applicant files current and make use of the files for every job vacancy. See pp. 208-211 supra.

Stations permitted to use this option could file a "short form" (FCC 396-EZ) when seeking license renewal. Such a form ("Form 396-EZ") would be analogous to the IRS' Form 1040-EZ for simple tax returns.

Stations using Form 396-EZ would not be relieved of their affirmative action compliance responsibilities. However, they could certify on Form 396-EZ to the principal nondiscrimination and targeted recruitment tasks expected of them. They would also (1) identify the organizations they use to recruit minority and female job candidates whenever a job is open; or (2) identify the structured recruiting activities they personally attend; or (3) both. They would not be expected to submit data applicable only to larger stations (e.g. detailed data on training).

The information on Form 396-EZ, combined with the annual employment data which would still be reported on Form 395, would provide members of the public with sufficient information to determine whether these stations are complying with each section of the EEO Rule, and sufficient information to permit the Commission to make the public interest determination required by Section 309 of the Communications Act.

Here is a draft of Form 396-EZ.

**FORM 396-EZ FOR RENEWAL APPLICANTS WITH 100
OR FEWER PERSON-MONTHS OF EMPLOYMENT PER YEAR**

Name of Licensee: _____

Address: _____

Telephone Number: () _____

Call letters and communities of license of stations and
headquarters units using this Form 396-EZ:

Name and Title of
Person Responsible
for EEO Compliance _____

[Insert Instructions Here]

1. Number of Person-Months on Form 395 for 1997 _____
2. Number of Person-Months on Form 395 for 1998 _____
3. Number of Person-Months on Form 395 for 1999 _____
4. Number of Person-Months in 2000 _____

NOTE: The average of lines 1-3 must be less than 100.
If you reported more than 140 person-months in response
to any of questions 1-4, you cannot use Form 396-EZ and
should instead file Form 396. If you had fewer than 80
person-months of employment this year (2000) you do not
need to file Form 396 or Form 396-EZ.

5. It is our policy to provide employment opportunity to all
qualified individuals without regard to their race, color,
religion, national origin or sex in all personnel actions
including recruitment, selection, promotion, compensation,
benefits, working assignments, training, layoffs and
termination. _____

Form 396-EZ (continued)

6. It is our policy to seek the realization of equal employment opportunity through a positive, continuing program of specific practices designed to promote equal employment opportunity without regard to race, color, religion, national origin or sex. _____
7. It is the responsibility of all persons making employment decisions with respect to the recruitment, selection, promotion, compensation, benefits, working assignments, training, layoffs and termination of employees to ensure that our policy and program is adhered to and that no person is discriminated against in employment because of race, color, religion, national origin or sex. _____
8. We post notices informing applicants and employees that the station is an equal opportunity employer and that they have the right to notify an appropriate local, state, or federal agency if they believe they have been the victims of discrimination. _____
9. Our station's employment application form contains a notice informing prospective employees that discrimination because of race, color, religion, national origin or sex is prohibited and that they may notify the appropriate local, state, or federal agency if they believe they have been the victims of discrimination. When we publish a help wanted advertisement, it contains a statement or logo indicating that we are an equal opportunity/affirmative action (EOE/AA) employer. _____
10. If our staff is not fully representative of the racial and gender makeup of the community, we do not use word of mouth contacts as the primary means of recruiting to fill any job vacancy. However, we do encourage employees to refer qualified minority and women candidates for existing and future job openings. _____
11. We do not require our employees or job applicants, as a condition of employment or continued employment, to enter into agreements binding them to arbitrate EEO disputes. (Please attach a copy of any agreement employees may enter into voluntarily which would bind them to arbitrate EEO disputes, with any proprietary financial information redacted; or please provide a copy of an opinion letter from the Commission's staff validating such an agreement.) _____

Form 396-EZ (continued)

12. During the past twelve months we hired the following persons:

<u>Employee</u>	<u>Race and sex</u>	<u>Job category; fulltime or parttime</u>
Person #1	_____	_____
Person #2	_____	_____
Person #3	_____	_____
[etc.]		

13. During the past twelve months we promoted the following persons:

<u>Employee</u>	<u>Race and sex</u>	<u>Previous job category; fulltime or parttime</u>	<u>New job category; fulltime or parttime</u>
Person #1	_____	_____	_____
Person #2	_____	_____	_____
Person #3	_____	_____	_____
[etc.]			

14. Minority group representation in the available labor force _____
is less than five percent, and we do not choose to file
EEO program information for minority groups.

Form 396-EZ (continued)

15. Answer either (a), (b), or both:

- (a) Whenever a position is available and not to be filled by promotion from within, we contact a variety of institutions and organizations likely to refer minority and women candidates. (Examples include educational institutions such as area schools and colleges with high minority and female enrollments, minority and women's organizations, state employment services or agencies, and media with particular interest to minorities and women.) At least annually, we invite representatives of these organizations to visit the station to familiarize themselves with our employment needs. During the past twelve months, our recruiting sources include:

Name of recruiting source (specify if it is a female or minority organization)	Contact person and phone number, and customary method of contact (e.g., phone, mail or fax)	Frequency of use in past 12 months (on occasion, or whenever a job <u>is available</u>)	Frequency of expected use in forthcoming license term (on occasion, or whenever a job is <u>available</u>)
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

Form 396-EZ (continued)

- (b) A management-level employee personally attends at least four events each year designed to facilitate the recruitment of minorities and women for media employment. (Examples are minority and female recruitment-oriented job fairs sponsored by state or local broadcasters' associations or community organizations, and recruiting visits to high schools, colleges, universities and broadcasting schools.) Resumes or applications collected at these activities are kept current, and we consult these resumes or applications whenever a job is open. During the past twelve months, these activities included:

<u>Name of activity</u>	<u>Date</u>	<u>Approximate percentages of women and of minorities at activity</u>	<u>Contact person and phone number</u>	<u>Name and job title of station representative in attendance</u>
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

16. We attempt to maintain contact with qualified minority and female applicants for at least one year if we are unable to offer them the position they initially sought. _____
17. We attempt to maintain contact with minority and female former employees for at least one year to encourage them to refer colleagues when positions are available. _____
18. During the license term, were any complaints filed before any body having competent jurisdiction under federal, state, territorial or local law, alleging unlawful discrimination in the employment practices of the station, any commonly owned stations, or any headquarters unit of your company or your parent company? (Examples of bodies having such jurisdiction include the Equal Employment Opportunity Commission (EEOC), state and local equal opportunity or human relations commissions, or other appropriate agencies.) _____

NOTE: If the answer to Question 18 is Yes, please attach an explanation, identifying the persons involved, the date of filing, the court or agency, the file number (if any), and the disposition or current status of the matter.

Form 396-EZ (continued)

19. (Mandatory): Provide other information that you believe would allow the FCC to more completely evaluate your efforts in providing equal opportunity in employment at your station. You may include a description of any problems the station has experienced in assuring equal employment opportunity or in attracting qualified minority and women candidates for employment or promotion; any efforts the station has undertaken or will undertake to encourage applications from minorities and women; any efforts the station has undertaken to develop business relationships with minority or female entrepreneurs (e.g., purchasing goods and services); any training programs designed to enable minorities and women to compete in the broadcast employment market; and any station initiatives or policies aimed at promoting equal opportunity in employee selection, promotion, compensation, benefits, working assignments, training, layoffs and termination.
20. (Mandatory): Will the EEO Program set out above be continued in essentially the same form throughout the forthcoming license term? Please describe any anticipated modifications.

I certify to the best of my knowledge, information and belief that all statements contained in this report are true and correct.

[Signature, Title, Date, and Name of Respondent]

C. The Commission should afford citizens standing as "petitioners for remedial sanctions" when they do not seek denial of the application

A quirk in Commission procedure forces persons with a complaint about a station's employment practices to file that complaint in the form of a petition to deny, even if they only seek the imposition of prospective EEO conditions or a forfeiture rather than denial of the application following an evidentiary hearing. The rules do not allow a person to ask the Commission to reform a licensee rather than replace it.

If complainants do not ask for denial of the application, the complaint is treated as an informal objection under Section 73.3587 of the Rules.^{430/} The Commission may dispose of informal objections summarily.^{431/} It usually denies informal objectors the opportunity to seek reconsideration,^{432/} and an informal objector has no standing to appeal.^{433/} Thus, the Commission has unintentionally created a disincentive for the filing of pleadings tailored to their precise facts. The Commission essentially forces both petitioners and licensees always to litigate as though the license was on the line.

^{430/} See Letter to William F. Baker (WNET-TV) (Chief, MMB, December 20, 1990), p. 1.

^{431/} Backlog Reduction, 10 FCC Rcd 10612 (MMB 1995) (holding that a staff decision will "generally" not discuss the allegations in an informal objection.)

^{432/} See, e.g., Toledo Broadcasting Company, Inc., 10 FCC Rcd 8242 ¶4 (1995).

^{433/} See Llerandi v. FCC, 863 F.2d 79 (D.C. Cir. 1988).

Far more EEO violators should have their licenses on the line in hearing, but not every EEO violator should have its license at stake. If citizen groups and other persons had the opportunity to file serious objections as "petitions for remedial sanctions" and extremely serious objections as petitions to deny, the Commission would enjoy greater flexibility in structuring its docket, and it would be better able to flag the worst cases for more thorough attention.^{434/} Everyone involved in the process -- the citizen groups, the licensees and the Commission would find the renewal process much more focused and much less stressful.^{435/}

^{434/} The D.C. Circuit has signalled that an approach such as this would enjoy its support. See NOW, 555 F.2d at 1020 n. 119 ("[p]resumably NOW does not seek an evidentiary hearing as an end in itself but rather as a means to ensuring more positive affirmative action results"); Stone, 466 F.2d at 332 (court welcomes public interest group's intervention which prompts licensee compliance even if the public interest group did not succeed in having a renewal set for hearing.)

^{435/} In addition, a petitioner to deny should be permitted to convert its petition into a petition for remedial sanctions if its review of the station's opposition to the petition to deny, or its response to a Bilingual letter, relieves some of the group's concerns about the station's EEO program. Furthermore, if a station's opposition to a petition for remedial sanctions or its response to a Bilingual letter contains new information which shows that the station's EEO violations are deliberate and especially callous, a petitioner for remedial sanctions should be permitted to convert its petition into a petition to deny. Complainants could still style their filings as informal objections, and some complaints would still be treated as informal objections (e.g., filings with a major procedural defect (timeliness, lack of a supporting declaration or lack of service of process) or filings which seek no sanctions at all.) We do not propose to allow an informal objector to convert its filing into a petition for remedial sanctions or into a petition to deny.

D. The Commission should create incentives for a fixed, small percentage of the industry who would be deemed "Superperformers"

Many companies at least minimally comply with the EEO Rule because they realize that equal opportunity is good business. However, some of the tasks attendant to making up for decades of FCC and industry neglect of equal opportunity cost more than their benefits to any individual company acting alone. Economists refer to this dilemma as the "free rider" problem: no single company has a financial incentive to bear, by itself, the costs of solving a social problem common to all of society (e.g. pollution control). For example, there is a financial disincentive to train minorities and women for positions in broadcast management, because EEO noncompliers will hire away those trained by EEO compliers. See p. 111 supra.

Thus, we must find a way to make it financially rewarding to be an EEO "Superperformer", much as the tax certificate policy worked so well by providing financial incentives to sell stations to minorities.^{436/} The Commission should seek congressional approval of any EEO incentive initiatives it presently lacks jurisdiction to implement. We recommend these seven:

1. Elimination of sanctions passing from a former owner selling to a Superperformer. When a Superperformer buys a station that has a forfeiture pending for any reason (including but not limited to EEO), or a conditional or short-term renewal, the

^{436/} See Frawley, 32 Fed. Comm. Law J. at 295 (noting that the EEO Rule "has resulted in a slow improvement in minority employment levels" but concluding that "meaningful minority participation in the broadcast industry must be brought about in other ways, including various forms of financial incentives to incumbent broadcasters").

forfeiture would be waived and the conditions and short term renewals would not pass on to the Superperformer, as they do now.^{437/} This would give Superperformers an advantage over other companies in financing and rapidly closing on acquisitions, and it would provide an incentive for EEO noncompliers to sell their stations to Superperformers.^{438/}

2. Expedited treatment of Form 301, Form 314 and Form 315 applications. Superperformers' major modification, and assignment and transfer applications (where the Superperformer is the buyer) would go to the front of the FCC's processing line.^{439/}

^{437/} See, e.g., Michigan/Ohio Renewals, 3 FCC Rcd 6944, 6950 n. 26 (1988).

^{438/} There is already some precedent for this. In Turner Communications Corp., 47 RR2d 513 (1980), the Commission approved the assignment of a television station to Group W. Relying on Group W's superior EEO record at all of its stations, the Commission vacated a short-term renewal it had previously imposed on Turner, thereby enabling the sale to go forward in harmony with a provision in the asset purchase agreement that a closing need not occur unless the seller could deliver the buyer a full term renewal. The Commission held that "Westinghouse's result-oriented EEO record affords the reasonable assurance of continuing, positive affirmative action at WRET-TV that our earlier action was designed to provide. Therefore, it is not necessary to carry over WRET-TV's short term renewal and EEO reporting conditions upon the assignment of that station to Westinghouse." Id. at 514 ¶3. Cf. Cook Inlet Radio License Partnership, L.P., 8 FCC Rcd 2714, 2721 and 2722 (1993) (Separate Statement of Commissioner James H. Quello and Separate Statement of Commissioner Andrew C. Barrett) (noting that the Commission wishes to assist minority owned companies who have demonstrated outstanding performance to sell their stations more easily); but see id. at 2717 (Dissenting Statement of Chairman Alfred C. Sikes).

^{439/} For example, consistent with the required 30-day period for petitions to deny in Section 309(d)(1) of the Communications Act, the Commission could issue a public notice requiring potential petitioners to deny to file a pro forma Notice of Intent to file a petition to deny against a Superperformer within twenty days. Absent such a Notice of Intent, the Commission could issue a Preliminary Determination of Grantability, enabling the Commission's staff to grant the application immediately upon expiration of the petition to deny period if no petition to deny has been filed.

3. Fee waivers. Superperformers in financial distress would be treated like public broadcasters as to any nonstatutory application fees: such fees would be waived.^{440/}

4. Bidding credits. Superperformers would receive a 5% bidding credit in auctions for new services.

5. Priority for selection of frequencies. Superperformance would be a factor in the allotment of frequencies for ATV, DAB, and the AM Expanded Band.

6. Multiple ownership waivers. In the largest markets (where it wouldn't be anticompetitive), Superperformers requiring multiple ownership rule waivers would be granted twenty-four month waivers rather than the twelve or eighteen month waivers commonly granted now. Extraordinarily progressive Superperformers would receive a bump-up to nine radio stations or a VHF/UHF or UHF-UHF television combination.

7. Rebuttable presumption of EEO compliance. Superperformers who somehow find themselves subject to a holding that would otherwise result in an EEO forfeiture would, by discretionary action, receive an admonishment instead.

^{440/} In GAF Broadcasting Company, Inc., 8 FCC Rcd 4396, 5499 ¶¶19-21 (1993) (subsequent history omitted), the Commission pointed out that EEO violations "might be pertinent to the ALJ's determination of GAF's entitlement to a renewal expectancy, even if no qualifying EEO issue were designated against GAF." Thus, adverse comparative findings going to the ability to hold a license can flow from non-disqualifying EEO violations. It follows, then, that in other comparative contexts, such as auctions, EEO performance is relevant. See also Town and Country Radio, Inc., 41 RR2d 151, 159-164 (Rev. Bd. 1977), recon. denied, 41 RR2d 1177 (Rev. Bd. 1977), in which the Board assessed a comparative demerit for nondisqualifying EEO violations at an applicant's stockholder's other stations.

This incentive program would be open to everyone, but would especially benefit minority owners, most of whom have always been Superperformers.^{441/} Indeed, minority owners already operate at a competitive disadvantage because they spend more than any other group of broadcasters on training minorities who are later hired away by other companies. See Declaration of James L. Winston, Executive Director and General Counsel, National Association of Black Owned Broadcasters (Exhibit 5 hereto) at 4 (noting the potential value of Superperformance incentives for minority owners).

To determine who is a Superperformer, the Commission could establish a certification and audit procedure, under which a company could seek a Superperformance Certification and renew it annually. A Superperformance Certification would be based on a track record dating back at least three years. The certification process could be outsourced to a Certifying Contractor; thus, the certification process would cost the government nothing and would not engage the Commission in evaluating licensees' EEO bonafides comparatively.^{442/} The Commission would select a private company with EEO expertise to be the Certifying Contractor, and give that company a five year contract in order to ensure decisional continuity, or it could designate the Telecommunications Development Fund as the Certifying

441/ See Honig at 87-88 (finding, for example, that among Black oriented stations, 72% of management employees at Black owned stations were Black but 38% of management employees at White owned stations were Black.)

442/ The only time the Commission might be asked to look behind a Superperformance Certification is in the event of a complaint that a grossly impermissible factor tainted the certification process. These rare complaints could be directed to the Inspector General.

Contractor. The Certifying Contractor would be compensated by certification applicants through a fee structure the Commission would approve. To ensure that a Superperformance Certification is meaningful, the Certifying Contractor would be authorized to certify no more than 10% of the industry as Superperformers, on a comparative merit basis. In this way, the value of being a Superperformer would not be cheapened, and the Superperformance procedure could not be used as a backdoor means of swallowing any of the rules for which Superperformers would seek waivers. See Top 50 Policy Repeal, 75 FCC2d at 587 (noting that the Commission had never refused to waive the three station limit on a company's holdings of large market VHF stations in response to a public interest showing).

In addition to having a clean record of basic EEO compliance, three factors would be used to evaluate Superperformance:

- I. An exceptionally well developed EEO Program, insuring that minority and women's organizations are contacted whenever a job is open, that the contacts are genuine and intensive (e.g., station visits, participation in the organizations' job fairs and other events), and that minorities and women are each included in at least 80% of the station's top four category jobs' interview pools.
- II. A well developed EEO compliance program aimed at areas of labor relations beyond job recruitment: selection, job assignment, working conditions (including sexual harassment) promotion, compensation, benefits, discipline, layoffs and termination.

III. A training, internship, or incubation program which provides opportunities well beyond the call of duty. 443/

None of these criteria involves a statistic on the number of persons hired or employed. Such statistics are certainly useful as a piece of evidence of noncompliance, see Griggs v. Duke Power Co., 401 U.S. 424 (1971), but need not (and probably should not, to avoid even the appearance of "quotas") be used as evidence of the presence of an outstanding compliance program when better evidence -- i.e., the program itself -- is available. The goal of Superperformance is to fertilize the industry with persons who enjoy decision making power, who receive training for advancement, who are treated well and compensated fairly, and who are empowered to mentor others and bring them into the industry. Raw numbers don't always measure this well. Furthermore, it's virtually always going to be the case that a company with a program like that described above will have good "numbers" because an outstanding EEO program, over time, will invariably generate good numbers.444/

443/ See Nondiscrimination - 1969, 18 FCC2d at 245 ("the equal opportunity programs...do not cover certain areas of employment practice which we described as most appropriate for an appeal to conscience...[these steps are] strongly urged as a voluntary supplement to the requirements of the proposed rules. Thus, broadcasters might consider the adoption of special training programs for qualifiable minority group members, cooperative action with other organizations to improve employment opportunities and community conditions that affect employability, and other measures in addition to the employment practices suggested in the proposed rules. These voluntary measures may well be the chief hope of achieving equal employment opportunity at the earliest possible time, and the decision to take such action rests with the individual broadcaster.")

444/ See 204-207 supra (illustrating why it is not appropriate to make the percentage of workforce parity attained by a station the touchstone for FCC recognition of an outstanding EEO program.